

**DATE:** 07-18-90

**CITATION:** VAOPGCPREC 50-90  
Vet. Aff. Op. Gen. Couns. Prec. 50-90

**TEXT:**

Subject: Eligibility for Educational Benefits Under Chapter 32--12 Months' Participation Restriction

(This opinion, previously issued as General Counsel Opinion 11-77, dated December 8, 1976, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

**QUESTIONS PRESENTED:**

(1) A servicemember suspends participation in the Post- Vietnam Era Veterans' Educational Assistance Program due to a hardship situation without participating for 12 months. The servicemember resumes participation, but does not have sufficient months left in the current obligated tour to provide 12 months' participation. Upon discharge, the person had participated for 11 months. Would there be eligibility for chapter 32 educational benefits?

(2) A servicemember has completed the obligated period of active duty or 6 years of active duty which began after December 31, 1976 (whichever is less), as provided for in 1631(a)(4) of chapter 32. He/she is still on active duty and is participating by making monthly contributions to the fund as provided for in section 1622(a). However, less than 12 monthly contributions have been made. Is the person entitled to chapter 32 educational benefits before 12 consecutive monthly contributions have been made?

**COMMENTS:**

Section 1621 of title 38, which is applicable here, reads as follows:

§ 1621. Eligibility

"(a) Each person entering military service on or after January 1, 1977, shall have the right to enroll in the educational benefits program provided by this chapter (hereinafter in this chapter referred to as the 'program' except where the text indicates otherwise) at any time during such person's service on active duty. When a person elects to enroll in the program, such person must participate for at least 12 consecutive months before disenrolling or suspending participation.

"(b) The requirement for 12 consecutive months of participation required by subsection

(a) of this section shall not apply when (1) the participant suspends participation or disenrolls from the program because of personal hardship as defined in regulations issued jointly by the Administrator and the Secretary of Defense (hereinafter in this chapter referred to as the 'Secretary'), or (2) the participant is discharged or released from active duty.

"(c) A participant shall be permitted to suspend participation or disenroll from the program at the end of any 12-consecutive-month period of participation. If participation is suspended, the participant shall be eligible to make additional contributions to the program under such terms and conditions as shall be prescribed by regulations issued jointly by the Administrator and the Secretary.

"(d) If a participant disenrolls from the program, such participant forfeits any entitlement to benefits under the program except as provided in subsection (e) of this section. A participant who disenrolls from the program is eligible for a refund of such participant's contributions as provided in section 1623 of this title.

"(e) A participant who has disenrolled may be permitted to reenroll in the program under such conditions as shall be prescribed jointly by the Administrator and the Secretary." (Emphasis supplied.)

We believe that the following excerpts from the report of the Senate Committee on Veterans' Affairs (Senate Report No. 94-1243, p. 104-105) will be of assistance in determining the intent of the Congress in the areas of concern:

#### "§ 1621. Eligibility

"Subsection (a) extends the right to enroll in the educational benefits program to any and all persons who enter the military on or after January 1, 1977. Whenever a person elects to enroll in the program and become a participant that person must contribute for at least 12 consecutive months before disenrolling or suspending participation. This requirement should ease the administrative burden of the Department of Defense and the Veterans' Administration. The Committee expects that most participants will continue to contribute until they are discharged or released from active service or until they have contributed the maximum allowable contribution (\$2,700).

"Subsection (b) provides limited exceptions to the general requirement of 12 consecutive months of contribution. First, of course, a participant need not contribute for 12 consecutive months if the participant is discharged or released from active duty prior to fulfilling that requirement. Second, an exception would also be made in instances of personal hardship as defined in regulations issued jointly by the Administrator and the Secretary of Defense. The Committee is aware that in administering programs instances occur when the need for the administrative ease assured by the consecutive month rule is outweighed by the need of an individual with a personal hardship. In this regard, the Committee expects that the implementing regulations will provide for the operation of equity. The Committee also recognizes that

the personal budget of individual participants is subject to fluctuation, and as such, flexibility is needed. In this regard, the Committee notes that an alternative to either suspension or disenrollment is a reduction in the amount the participant has elected to contribute each month.

"Subsection (c) permits each participant to suspend participation or disenroll from the educational benefits program at the end of any 12-month period. Participants are also permitted to disenroll or suspend participation prior to the end of any 12-month period of participation in those instances of personal hardship. To the extent that contributions have been made, the individual who has suspended participation will remain entitled to educational benefits as computed by the formula in section 1631(a)(2). The Committee anticipates that most participants will participate and contribute until the maximum allowable contribution has been reached. However, the Committee recognizes that financial circumstances for individuals fluctuate and, to that extent, has made the program flexible by permitting participants to suspend or disenroll at the end of any 12-month consecutive period.

"The Committee expects that any regulations in regard to the eligibility of suspending participants to make additional monthly contributions following suspension will be designed to encourage the participant to resume the monthly deductions. The Committee has distinguished between disenrollment (and the right to obtain a refund) and suspension (and the right to make additional monthly contributions). Suspension permits flexibility for participants in regard to monthly income flow, disenrollment signifies a desire to obtain accumulated equity. Of course, the additional monthly contribution which the suspended participant would be eligible to make subsequently is limited by section 1622(a) (\$50-\$75 monthly).

"Subsection (d) provides that whenever a participant disenrolls, such participant forfeits entitlement for the matching funds outlined by section 1622. (A participant who only suspends participation does not forfeit entitlement for matching funds.) However, a disenrolled participant is eligible for a refund of his contributions.

"Subsection (e) permits a participant who has disenrolled to reenroll in the program under such conditions as are prescribed jointly by the Administrator and the Secretary." (Emphasis supplied.)

#### **HELD:**

(1) The individual who has not participated for 12 consecutive months, who suspends participation because of a hardship situation, and upon discharge has participated for 11 months would be eligible for chapter 32 educational benefits. Our opinion is based upon the following:

a. Under the provisions of section 1621(b), the individual is permitted to suspend participation before completing 12 months of participation on grounds of personal hardship.

b. It is clear that where the individual suspends participation because of personal hardship he or she has not forfeited the right to benefits under chapter 32.

c. Benefits are payable where the individual is discharged prior to the completion of the 12 months' requirement.

(2) The law, as well as pertinent excerpts from the Senate Veterans Affairs Committee report to accompany S. 969 (S. Rep. No. 1243, 94th Cong., 2d Sess. 104, 105), all speak of the 12 months' consecutive participation requirement. These are directed primarily at points in time when the individual can make a decision to suspend participation or to disenroll in the program. In the absence of any specific expression to the contrary, we are of the view that the Administrator may, in an individual's second enlistment, authorize a shorter period of time before the individual may become eligible for chapter 32 participation. Therefore, a serviceperson who has completed an obligated period of active duty, but who is still on active duty and participating in the program by making monthly contributions, may, upon a determination by the Administrator, be eligible for educational benefits before 12 consecutive monthly contributions have been made.

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